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No. 04-1067

In the Supreme Court of the United States

STATE OF GEORGIA, PETITIONER

v.

SCOTT FITZ RANDOLPH

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether an occupant may give law enforcement valid consent to search the common areas of premises shared with another when the other occupant is also present and objects to the search.

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INTEREST OF THE UNITED STATES

This case presents the question whether an occupant may give law enforcement valid consent to search the common areas of premises shared with another when the other occupant is also present and objects to the search. Federal law enforcement officers frequently conduct searches of premises based on an occupant's consent. In addition, the federal government prosecutes cases in which evidence has been obtained pursuant to consent searches conducted by state authorities. The United States therefore has a significant interest in the Court's disposition of this case.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the United States Constitution provides: "The right of the people to be secure in

their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated * * * ."

STATEMENT

1. In late May 2001, respondent Scott Fitz Randolph and his wife separated. Mrs. Randolph and their son went to stay in her parents' home in Canada. On or about July 4, 2001, Mrs. Randolph and her son returned to the marital residence in Americus, Georgia. Pet. App. 7.

On the morning of July 6, 2001, Mrs. Randolph called the local police department to report a domestic dispute with respondent. When officers arrived at the Randolphs' home, Mrs. Randolph appeared very upset and complained that respondent had taken their son away. She also told the officers that respondent's cocaine use had caused financial problems for the family, and that drugs were then on the premises. Respondent returned to the home within a few minutes. He told the officers that he had left their son with a neighbor because he was concerned that his wife would again leave the country with the child. Respondent also claimed that his wife was inebriated and was an alcoholic. Pet. App. 7-8; Pet. 3.

One of the officers accompanied Mrs. Randolph to the neighbor's house to retrieve the child. Upon their return, the officer asked respondent about Mrs. Randolph's allegations concerning his drug use. The officer also sought respondent's consent to search the residence, but respondent declined to give consent. The officer then asked Mrs. Randolph for consent to search the home, and she agreed. Mrs. Randolph led the officer to an upstairs bedroom, in which the officer saw a "piece

of cut straw" on a dresser. A closer examination revealed the presence of white residue on the straw, which led the officer to suspect that the straw had been used to ingest cocaine. Pet. App. 8.

After the officer retrieved an evidence bag from his car, Mrs. Randolph told him that she was withdrawing her consent to the search. The officer collected the straw and white residue and returned to the police station with respondent and Mrs. Randolph. The officer then obtained a search warrant for the Randolphs' home, and the ensuing search uncovered a number of additional drug-related items. Pet. App. 8; Pet. 3-4.

2. Respondent was indicted on a charge of possession of cocaine. He filed a motion to suppress the evidence seized from his home, arguing that the Fourth Amendment barred the search of his residence over his objection. On October 17, 2002, the trial court denied the motion, ruling that Mrs. Randolph had "common authority to grant consent for police to search the marital home." The court concluded that "one spouse can consent to a search of the marital premises, and the other spouse cannot withdraw that consent, regardless of the other spouse's presence or absence at the time the consent was given and knowledge of that consent being given." J.A. 23; Pet. App. 8.

The Georgia Court of Appeals, after granting respondent's application for an interlocutory appeal, reversed the trial court in a divided disposition. Pet. App. 7-47. The majority viewed the circumstances of this case as "exceedingly close" (*id.* at 9) to those in *United States* v. *Matlock*, 415 U.S. 164 (1974). *Matlock* held that officers could conduct a warrantless search of the defendant's home based on the consent of another occupant who possessed joint authority over the premises. Nonetheless,

the Georgia Court of Appeals distinguished *Matlock* on the ground that, here, respondent "was not only present" at his home at the time of the search, but he also had "affirmatively exercised" his Fourth Amendment rights "by refusing to consent to the search." Pet. App. 12.

The dissent concluded that there was no material distinction between this case and *Matlock*. Pet. App. 26-47. The dissent reasoned that, because Mrs. Randolph "shared full dominion over the marital household with [respondent] and the bedroom in which the contraband was discovered," respondent had "assumed the risk that his wife would consent to the search of the home." *Id.* at 47.

3. The Supreme Court of Georgia affirmed in a divided opinion. Pet. App. 1-6. The majority explained that it was "faced with a situation in which two persons have equal use and control of the premises to be searched." *Id.* at 1. In those circumstances, the majority concluded, "the consent to conduct a warrantless search * * * given by one occupant is not valid in the face of the refusal of another occupant who is physically present at the scene." *Ibid.* In the majority's view, *Matlock* was grounded in the understanding that "one co-inhabitant * * * assume[s] the risk that a second co-inhabitant will consent to a search of common areas in the absence of the first co-habitant." *Id.* at 2-3. But "the risk assumed by joint occupancy goes no further," the majority believed, in that "the risk 'is merely an inability to control access to the premises during one's absence.'" *Id.* at 3 (quoting 3 Wayne R. LaFave, *Search & Seizure* § 8.3(d), at 731 (3d ed. 1996)). The majority therefore held that, "should the cohabitant be present and able to object, the police must also obtain the

cohabitant's consent." *Ibid.* (quoting *State* v. *Leach*, 782 P.2d 1035, 1040 (Wash. 1989)).

Three Justices dissented from the majority's holding. Pet. App. 3-6. The dissent believed that the correct approach under *Matlock* is to look "not to the defendant's presence or absence" at the scene, but instead "to whether * * * he assumed the risk that the third party who possessed common authority over the premises would permit inspection in [her] own right." *Id.* at 5-6. Here, the dissent explained, respondent, in jointly occupying the home with his wife, had "assumed the risk that * * * she would expose their common private area to such a search" and "that his opposition to the presence of police in his home would not override his wife's consent." *Id.* at 6 (citation, internal quotation marks, and brackets omitted).

SUMMARY OF ARGUMENT

When a residence is jointly occupied by two persons with equal authority over the premises, the Fourth Amendment permits a search based on the consent of either one. *United States* v. *Matlock*, 415 U.S. 164 (1974); *Illinois* v. *Rodriguez*, 497 U.S. 177 (1990). There is no basis for carving out an exception to that rule for cases in which both occupants are present at the time of the search, and one occupant consents while the other objects.

The foundational premise of the law of consent searches is that an individual may make a voluntary decision to permit the police to inspect property over which she has control. That principle applies when one party consents to a search of jointly held property, because each joint occupant has the right to grant access to the premises and each assumes the risk that a co-oc-

cupant will allow the authorities to enter. The validity of such a consent does not rest on any notion that each individual implicitly grants an agency authority to his co-occupants. Rather, it rests on the more basic principles that each co-occupant may grant consent, that a consent search constitutes an important law enforcement tool, and that there is a strong social interest in respecting the independent decision of a co-occupant to exercise her authority to permit a search.

The Georgia Supreme Court in this case announced a different rule for cases in which both joint occupants are present at the time of the search. In that situation, the court held, officers must solicit and obtain the consent of both occupants. There is no sound basis for requiring law enforcement to take that step. Such a requirement would be at odds with the facts in both *Matlock* and *Rodriguez*. In both cases, the defendant was *not* consulted, even though he was present at the scene; rather, officers searched the defendant's residence based solely on the consent of a third party who shared (or was believed to share) authority over the premises.

A requirement to obtain the consent of both occupants when both are present would also be at odds with general Fourth Amendment principles. Individual privacy interests are inherently qualified when an individual chooses to live with another person. An individual has no reasonable expectation that his co-occupant will not permit law enforcement to conduct a search. An analogous situation exists when one party to a telephone conversation consents to monitoring by law enforcement. Even though both individuals are "present" in the conversation and have privacy interests in it, the Court has made clear that the consent of one party is sufficient to validate the "search." See *United States* v. *White*, 401

U.S. 745 (1971). The same analysis applies here, where "*both* [co-occupants] share the power to surrender each other's privacy to a third party," such that "either may give effective consent" to a search. *United States* v. *Karo*, 468 U.S. 705, 726 (1984) (O'Connor, J., concurring in part and concurring in the judgment).

A rule requiring the consent of a joint occupant when he happens to be on the premises would enhance privacy interests based only on an accident of timing, while frustrating legitimate societal interests. Adopting a rule based on happenstance would encourage law enforcement to base decisions on timing considerations—such as the likelihood that a potentially objecting party will be present—rather than on law enforcement concerns. Allowing the objection of one occupant to thwart the consent of another might also prevent an innocent occupant from disassociating herself from her co-occupant's involvement in crime. Comparable concerns would arise when the consenting occupant has been the victim of abuse by a co-occupant who is present and unwilling to give consent. In such situations, a sound balancing of the competing interests supports validating the voluntary consent of the joint occupant who desires to cooperate in a law enforcement investigation.

For similar reasons, it would be unsound to attach dispositive significance to the fact that a co-occupant who is on the premises makes an explicit objection. *Matlock* itself makes clear that each co-occupant has an independent right to consent to a search; the objection of one occupant thus does not negate the consent of another. In addition, a rule that would give controlling weight to an affirmative objection is inconsistent with general Fourth Amendment principles, which do not put the onus on a property owner to voice an objection.

Such a rule would logically suggest (contrary to the facts of *Matlock* and *Rodriguez*) a prohibition on a consent search when an occupant is known to be present and has not been given a meaningful opportunity to voice an objection. It could also logically imply that the police must attempt to track down an off-site occupant to ascertain his views. Such complications underscore the flaws in an approach that fails to validate the choice of a co-occupant to consent to a search.

Applying those principles here, the search of respondent's residence was valid. Respondent's wife was found to have "joint access or control [of the residence] for most purposes," *Matlock*, 415 U.S. at 171 n.7, and her consent therefore validly supported the search.

ARGUMENT

OFFICERS MAY SEARCH A RESIDENCE BASED ON THE CONSENT OF ONE OCCUPANT NOTWITHSTANDING THAT ANOTHER OCCUPANT WHO SHARES THE PREMISES IS ALSO PRESENT AND OBJECTS TO THE SEARCH

Although the "Fourth Amendment generally prohibits the warrantless entry of a person's home," the "prohibition does not apply * * * to situations in which voluntary consent has been obtained." *Illinois* v. *Rodriguez*, 497 U.S. 177, 181 (1990). When two persons possess joint authority over the premises, either may give effective consent for a search. *United States* v. *Matlock*, 415 U.S. 164, 169-172 (1974); see *Rodriguez*, 497 U.S. at 179. Contrary to the conclusion of the Georgia Supreme Court below, the authority of a joint occupant to give valid consent to a search is not vitiated when the other occupant is also present and objects to the search. The courts of appeals that have considered the issue have

uniformly reached that conclusion,[1] as have a decided majority of state courts.[2]

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[1] See *United States* v. *Lewis*, 386 F.3d 475, 481 (2d Cir. 2004), cert. denied, 125 S. Ct. 1355 (2005); *United States* v. *Morning*, 64 F.3d 531, 533-536 (9th Cir. 1995), cert. denied, 516 U.S. 1152 (1996); *Lenz* v. *Winburn*, 51 F.3d 1540, 1548 (11th Cir. 1995); *United States* v. *Donlin*, 982 F.2d 31, 33 (1st Cir. 1992); *United States* v. *Hendrix*, 595 F.2d 883, 885 (D.C. Cir. 1979); *United States* v. *Bethea*, 598 F.2d 331, 335 (4th Cir.), cert. denied, 444 U.S. 860 (1979); *United States* v. *Sumlin*, 567 F.2d 684, 687-688 (6th Cir. 1977), cert. denied, 435 U.S. 932 (1978); see also *United States* v. *Aghedo*, 159 F.3d 308 (7th Cir. 1998) (defendant was present and did not consent or object); *United States* v. *Baldwin*, 644 F.2d 381, 383 (5th Cir. 1981) ("Although Baldwin previously had refused consent, his wife could still consent to a search of the automobile where, as here, it appeared she had at least joint control over the auto.").

[2] See *Love* v. *State*, 138 S.W.3d 676, 680 (Ark. 2003); *People* v. *Sanders*, 904 P.2d 1311, 1313 (Colo. 1995); *State* v. *Zimmerman*, 529 N.W.2d 171, 174 (N.D. 1995); *City of Laramie* v. *Hysong*, 808 P.2d 199 (Wyo. 1991); *People* v. *Haskett*, 640 P.2d 776, 785-787 (Cal. 1982); *In re Anthony F.*, 442 A.2d 975, 978-979 (Md. 1982); *Commonwealth* v. *Ploude*, 688 N.E.2d 1028, 1029-1031 (Mass. App. Ct. 1998); *State* v. *Ramold*, 511 N.W.2d 789, 792-793 (Neb. Ct. App. 1994); *Brandon* v. *State*, 778 P.2d 221, 223-224 (Alaska Ct. App. 1989); *People* v. *Callaway*, 522 N.E.2d 337, 342-343 (Ill. App. Ct. 1988); *State* v. *Washington*, 357 S.E.2d 419, 426-427 (N.C. Ct. App. 1987) (dictum); *State* v. *Frame*, 609 P.2d 830 (Or. Ct. App. 1980), cert. denied, 450 U.S. 968 (1981); *People* v. *Cosme*, 397 N.E.2d 1319 (N.Y. 1979); see also *Welch* v. *State*, 93 S.W.3d 50 (Tex. Crim. App. 2002) (automobile). But see *State* v. *Leach*, 782 P.2d 1035 (Wash. 1989); cf. *In re D.A.G.*, 484 N.W.2d 787 (Minn. 1992) (invalidating search when consenting occupant was absent and police did not ask consent of defendant who was present); *Silva* v. *State*, 344 So.2d 559 (Fla. 1977) (declining to give effect to wife's consent over husband's objection but explaining, *inter alia*, that she did not have common authority over closet).

A. An Occupant Of Premises Shared With Another May Give Valid Consent For A Search Of The Common Areas

1. As this Court has long recognized, "[c]onsent searches are part of the standard investigatory techniques of law enforcement agencies," and are "a constitutionally permissible and wholly legitimate aspect of effective police activity." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 228, 231-232 (1973). In some situations, "a search authorized by a valid consent may be the only means of obtaining important and reliable evidence." *Id.* at 227; see *id.* at 243. The Court therefore has sought to avoid imposing "artificial restrictions" on consent searches that "would jeopardize their basic validity." *Id.* at 229. In part to preserve the value of consent searches, the Court in *Schneckloth* held that consent to search is validly given as long as it appears from the totality of circumstances that the consent was voluntary; there is no requirement that the individual was aware of his Fourth Amendment rights and voluntarily waived them. *Id.* at 235-248 (distinguishing *Johnson* v. *Zerbst*, 304 U.S. 458 (1938)).

Consistent with the view that the validity of a consent search does not rest on notions of a waiver of Fourth Amendment rights, an individual need not personally consent to a search of his property for a consent search of the property to be valid. Rather, the search is valid if based on the consent of a third party who jointly possesses the individual's premises or effects. See *Frazier* v. *Cupp*, 394 U.S. 731 (1969). *Frazier* upheld a search of the defendant's duffel bag on the ground that consent had been obtained from his cousin, who "was a joint user of the bag" and thus "clearly had authority to consent to its search." *Id.* at 740. The Court explained that the defendant, "in allowing [his cousin] to use the

bag and leaving it in his house, must be taken to have assumed the risk that [his cousin] would allow someone else to look inside." *Ibid.* Subsequently, in *Schneckloth*, the Court explicitly assumed "the constitutional validity of third-party consents," 412 U.S. at 246 n.34, and it declined to require proof of a knowing and voluntary waiver in part because that approach "would be throughly inconsistent with [its] decisions that have approved 'third party consents,'" *id.* at 245.

2. In *United States* v. *Matlock*, 415 U.S. 164 (1974), the Court applied third-party consent principles to the search of an individual's home. Although the officers in *Matlock* had not sought or obtained the defendant's consent before conducting a warrantless search of his residence, *id.* at 166, the Court held that the search could be sustained over his challenge based on the consent of the woman who had been living there with him. The Court explained that, "when the prosecution seeks to justify a warrantless search by proof of voluntary consent," it need not show that "consent was given by the defendant, but may show that permission to search was obtained from a third party who possessed common authority or other sufficient relationship to the premises." *Id.* at 171. The Court explained that the common "authority which justifies the third-party consent does not rest upon the law of property, with its attendant historical and legal refinements." *Id.* at 171 n.7; accord *Chapman* v. *United States*, 365 U.S. 610, 617 (1961). Rather, the authority "rests on mutual use of the property by persons generally having joint access or control for most purposes." *Matlock*, 415 U.S. at 171 n.7. In such circumstances, the Court concluded, "it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed

the risk that one of their number might permit the common area to be searched." *Ibid.*

In *Illinois* v. *Rodriguez*, 497 U.S. 177 (1990), the Court extended the *Matlock* rule to circumstances in which the third party has apparent authority to consent to a search of the premises. In that case, as in *Matlock*, the officers did not seek the defendant's consent to enter his residence, but instead obtained the consent of a third party believed to live there with him. The Court reiterated the holding of *Matlock* that a warrantless search of a person's home is valid "when voluntary consent has been obtained * * * from a third party who possesses common authority over the premises." *Id.* at 181; see *id.* at 179, 183-184. The Court explained that a search is reasonable under the Fourth Amendment when searching officers reasonably believe that the third party possesses adequate authority over the premises, even if it is later discovered that the party in fact did not reside there. *Id.* at 183-189.

B. The Authority Of One Occupant To Permit A Search Of Premises Jointly Possessed With Another Is Not Vitiated By The Presence Of The Other Occupant

The Georgia Supreme Court acknowledged the rule of *Matlock* that officers may conduct a warrantless search of a person's home based on the consent of another occupant who jointly occupies the premises. Pet. App. 2. In the court's view, however, *Matlock*'s principle is limited to cases in which the other occupant is absent from the premises at the time. When both occupants are present, the court believed, officers must obtain the consent of each before commencing a warrantless search. *Id.* at 3. The court reasoned that the "risk assumed by joint occupancy" is "merely an inability to control access

* * * during one's absence." *Ibid.* (internal quotation marks omitted). Contrary to the conclusion of the court below, there is no sound basis for carving out an exception to the *Matlock* rule for cases in which both occupants are present at the scene and one consents while the other objects.

Indeed, a presence-based exception is at odds with the facts of both *Matlock* and *Rodriguez*. In *Matlock*, the officers arrested the defendant "in the yard in front" of the house in which he was living, and they placed him in a parked squad car while they obtained consent to search the home from the woman who resided there with him. 415 U.S. at 166; see Pet. App. 11a, J.A. 6, 19, *United States* v. *Matlock*, *supra* (No. 72-1355). In *Rodriguez*, the officers were told by a woman that she had been assaulted by the defendant and that he was then asleep in the apartment she shared with him. 497 U.S. at 179-180. The officers entered the apartment based on her consent alone despite having been told that the defendant was present at the time. In both *Rodriguez* and *Matlock*, the Court held that the officers' entry could be sustained based solely on the consent of a third party who shared the premises with the defendant, notwithstanding that the defendant was known to be present in the residence (*Rodriguez*) or at the scene (*Matlock*).[3]

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[3] The opinion in *Matlock* includes the following statement: "the consent of one who possesses common authority over premises or effects is valid as against the *absent*, nonconsenting person with whom that authority is shared." 415 U.S. at 170 (emphasis added). Although that particular statement assumes the absence of the nonconsenting occupant, the statement "was embedded in a discussion of cases in which the Court addressed issues previously undecided." *United States* v. *Rith*, 164 F.3d 1323, 1328 (10th Cir.), cert. denied, 528 U.S. 827 (1999). The Court's ultimate articulation of the controlling principle was framed more broadly. See *Matlock*, 415 U.S. at 171 (finding it

The presence-related exception adopted by the Georgia Supreme Court not only fails to square with the factual circumstances addressed in *Matlock* and *Rodriguez*, but it also is unsound as a matter of principle. Whether a search is reasonable under the Fourth Amendment is generally determined by balancing its intrusion on the individual's privacy interests against its promotion of legitimate governmental interests. See, *e.g.*, *Wyoming* v. *Houghton*, 526 U.S. 295, 299-300 (1999); *Veronia School Dist. 47J* v. *Acton*, 515 U.S. 646, 652-653 (1995). *Matlock* and *Rodriguez* establish that the reasonableness requirement is ordinarily satisfied when officers search a home based on the consent of an occupant who has common authority over the premises. See *Rodriguez*, 497 U.S. at 183-184 ("There are various elements, of course, that can make a search of a person's house 'reasonable'—one of which is the consent of the person *or his cotenant*.") (emphasis added). As a general matter, moreover, a home-owner's Fourth Amendment protections do not depend on whether she is present on the property. There is no sound basis for a different rule that would make the validity of an occupant's consent

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"clear that when the prosecution seeks to justify a warrantless search by proof of voluntary consent," it "may show that permission to search was obtained from a third party who possessed common authority over or other sufficient relationship to the premises"). See also *id.* at 169 (endorsing assumption "that the voluntary consent of any joint occupant of a residence to search the premises jointly occupied is valid against the co-occupant"). Several courts have understood that the defendant was present at the scene in *Matlock*, and have concluded that an individual's presence thus cannot vitiate the valid consent of a third party who shares the premises with him. See *United States* v. *Childs*, 944 F.2d 491, 494 (9th Cir. 1991); *Sumlin*, 567 F.2d at 687; *Sanders*, 904 P.2d at 1314 n.5.

depend on whether the other occupant is present on the premises.

1. The risk assumed by a joint occupant that his co-occupant may consent to a search does not dissipate when he is also on the premises

a. Applying the *Matlock* rule when both occupants are present on the premises does not intrude on legitimate privacy interests. As *Matlock* explains, the authority of one occupant to permit a search of premises jointly possessed with others is rooted in the understanding that "the others have assumed the risk that one of their number might permit the common area to be searched." 415 U.S. at 171 n.7. The risk assumed by a joint occupant does not vary depending on whether he happens to be present when a co-occupant gives consent to a search. Rather, the risk inheres in the nature of a common occupancy and persists for the duration of the arrangement. Each occupant has an independent right to decide for herself to cooperate with the authorities by permitting a search of property she jointly controls; neither occupant has a veto power over that choice.

By entering into a joint occupancy, an individual relinquishes any unilateral entitlement to determine whom to allow on the premises and when to permit entry. "Although there is always the fond hope that a co-occupant will follow one's known wishes, the risks remain. A defendant cannot expect sole exclusionary authority unless he lives alone, or at least has a special and private space within the joint residence." *United States* v. *Morning*, 64 F.3d 531, 536 (9th Cir. 1995), cert. denied, 516 U.S. 1152 (1996). A joint occupant thus has no reasonable expectation that he retains absolute authority to prevent a co-occupant from permitting access to the jointly held

property, without regard to whether he is on the premises.[4]

Respondent suggests that one occupant can be considered to consent on behalf of a co-occupant when the latter is absent from the property, but that there is no reason to give effect to the consent of one occupant alone when both are present. See Br. in Opp. 3. That argu-

[4] Although *Matlock* observes that the authority of a third party to give effective consent to a search does not rest on the particularities of a cotenant's rights under the law of property, 415 U.S. at 171 n.7, a cotenant's inability to preclude a search consented to by another cotenant is consistent with the common law. A general principle of property law is that one cotenant has no right to exclude another cotenant from the premises, or to prevent the other cotenant from leasing the latter's rights in the property to a third party. See *Morning*, 64 F.3d at 536 n.6 ("[I]n general, co-tenants are entitled to full enjoyment of the joint property, and are not allowed to exclude the other co-tenants from it."); 7 *Powell on Real Property* § 50.06[4] (Michael Allen Wolf ed. 2005) ("Without consent of cotenants, each tenant in common may sell or encumber his or her property interest, and thus inject a stranger into the cotenancy.").

Of particular significance, under the common law of trespass, "[i]t is ordinarily held that a tenant in common may properly license a third person to make an entry on the common property, and the licensee, in making an entry in the exercise of his or her license, is not liable in trespass to nonconsenting cotenants." 86 C.J.S. *Tenancy in Common* § 135 (1997); see *Buchanan* v. *Jencks*, 96 A. 307, 309, 310-311 (R.I. 1916) ("[I]t would seem unreasonable to say that a cotenant could not authorize another to go upon the common land and do anything that he might do himself."); *Granger* v. *Postal Tel. Co.*, 50 S.E. 193 (S.C. 1905); *Harris* v. *City of Ansonia*, 47 A. 672, 673 (Conn. 1900); *Lee Chuck* v. *Quan Wo Chong*, 28 P. 45 (Cal. 1891); see also *Dinsmore* v. *Renfroe*, 225 P. 886 (Cal. Ct. App. 1924); *Causee* v. *Anders*, 20 N.C. 388 (1839) (affirming that tenant in common has right to enter property and take with him a guest). But see *Moore* v. *Moore*, 34 P. 90, 92 (Cal. 1893). In fact, "a cotenant who ejects a third person entering under such license is liable to him in trespass." 86 C.J.S., *supra*, § 135. The Georgia Supreme Court's result is in tension with those rules.

ment misconceives *Matlock*'s basis for giving effect to the consent of a third party who shares authority over the premises. The Court did not rely on an agency-related theory under which the validity of the third party's consent reflects an assumption that she acts on her co-occupant's behalf—in which case the latter's presence at the scene might negate any justification for the assumption. The Court instead relied on the understanding that the "mutual use of the property by persons generally having joint access or control" makes it "reasonable to recognize that any of the co-inhabitants has the right to permit the inspection *in his own right*." 415 U.S. at 171 n.7 (emphasis added); see *United States* v. *McAlpine*, 919 F.2d 1461, 1464 n.2 (1990) ("agency analysis [was] put to rest by the Supreme Court's reasoning in *Matlock*").[5]

b. The risk assumed by a joint occupant is comparable to the risk assumed "when an individual reveals private information to another," and the "well settled" rule in that context is that the disclosing individual "assumes the risk that his confidant will reveal that information to the authorities." *United States* v. *Jacobsen*, 466 U.S. 109, 117 (1984). An individual who shares information with another, even under a promise of confidentiality, forfeits the ability to preclude that person from sharing the information with law enforcement. Likewise, the Fourth Amendment permits law enforcement officers to obtain the consent of an individual to monitor his private

[5] Respondent also suggests (Br. in Opp. 3) that the *Matlock* rule is based on the practical need to avoid requiring officers to determine every occupant who is present on the premises. Although that concern undoubtedly is valid, it cannot alone explain the *Matlock* rule: in the facts of *Matlock* itself, officers not only knew of Matlock's presence but arrested him in the front yard of his residence.

conversations with another person, including conversations that take place in the latter person's home, on his private telephone, or in some other place in which he generally would possess a substantial privacy interest. See *United States* v. *White*, 401 U.S. 745 (1971); *Hoffa* v. *United States*, 385 U.S. 293 (1966); *On Lee* v. *United States*, 343 U.S. 747 (1952).

Just as an individual assumes the risk that persons with whom he speaks will disclose the information to the authorities or permit law enforcement to monitor their communications, a joint occupant analogously assumes the risk that a co-occupant will permit law enforcement officers to inspect their commonly held premises. The fact that both individuals are "present" in the case of an intercepted communication does not give rise to a right in both to be asked by law enforcement for consent; either participant's consent is sufficient. See *United States* v. *Karo*, 468 U.S. 705, 716 n.4 (1984) ("A homeowner takes the risk that his guest will cooperate with the Government."). Likewise, that an individual may be present at his home when a co-occupant elects to permit a search of the premises does not detract from the consenting co-occupant's authority; either occupant's consent is sufficient. In a concurring opinion in *Karo*, Justice O'Connor embraced precisely that analysis, finding it a "relatively easy case * * * when two persons share identical, overlapping privacy interests in a particular place, container, or conversation." *Id.* at 726 (O'Connor, J., concurring in part and concurring in the judgment). In that situation, she explained, whether two persons have a joint interest in a "particular place" or a "conversation," the controlling principle is the same: "*both* share the power to surrender each other's privacy to a

third party," and "either may give effective consent" to a search. *Ibid.*[6]

c. Under the approach of the Georgia Supreme Court, the authority of an occupant to give effective consent to a search would turn on a happenstance: whether the other occupant is also present at the time. Fourth Amendment protections, however, should not fluctuate based on accidents of timing in an occupant's presence or provision of consent. Cf. 4 Wayne R. LaFave, *Search and Seizure* § 8.3(d), at 162 (4th ed. 2004) ("[A] person against whom a search is directed should not lose his fourth amendment rights simply because he is not fortuitously present at the time consent was requested.") (internal quotation marks omitted). The Fourth Amendment generally does not require a property owner to voice an affirmative objection to a search, let alone be present to object. Yet the Georgia Supreme Court made that chance event the controlling consideration.

The normal rule, accordingly, is that a person's authority to prevent a search of his property does not vary depending on whether he happens to be present on the premises. See 6 LaFave, *supra*, § 11.3(a), at 131-132.

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[6] In concluding that the risk assumed by a joint occupant exists only when he is away from the premises, the Georgia Supreme Court relied on Professor LaFave's *Search and Seizure* treatise. See Pet. App. 3. The treatise, however, does not reach a definitive conclusion on the issue in this case. After describing the competing views, the treatise states that "there is merit to both positions," but finds "somewhat greater appeal" in the approach adopted by the court below. 4 Wayne R. LaFave, *Search and Seizure* § 8.3(d), at 159 (4th ed. 2004). And even with respect to that equivocal statement, the treatise later suggests that valid consent may exist in circumstances like those in this case, where "the consenting occupant acts to allow police seizure of items of contraband" that she "might otherwise have later been charged with possessing." *Id.* at 161-162.

Cf. *Stoner* v. *California*, 376 U.S. 483 (1964) (hotel clerk could not validly consent to search of customer's room despite customer's absence at the time); *Chapman*, 365 U.S. at 610 (landlord could not validly consent to search of tenant's home despite tenant's absence at the time). Generally, regardless of the person's presence or absence at the time, a search cannot intrude on legitimate privacy expectations absent valid consent. As to that question of consent, *Matlock* and *Rodriguez*—both of which in fact involved a defendant who was present, see p. 13, *supra*—establish that consent may be obtained "either from the individual whose property is searched * * * or from a third party who possesses common authority over the premises." *Rodriguez*, 497 U.S. at 181 (citation omitted).

2. Denying an occupant the ability to give effective consent when her co-occupant is present would frustrate legitimate societal interests

The Court explained in *Schneckloth* that it "is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals." 412 U.S. at 243 (quoting *Coolidge* v. *New Hampshire*, 403 U.S. 443, 488 (1971)). Instead, "the community has a real interest in encouraging consent, for resulting search may yield necessary evidence for the solution and prosecution of crime." *Ibid.* The approach of the Georgia Supreme Court would disserve those interests by allowing one occupant to thwart the ability of another occupant to cooperate with law enforcement and facilitate the investigation of crime. And "[i]n situations where the police have some evidence of illicit activity, but lack probable cause to arrest or search, a search

authorized by a valid consent may be the only means of obtaining important and reliable evidence." *Id.* at 227.

In addition to the general interest in contributing to the investigation of crime, an individual may have significant reasons of her own for consenting to a search. One situation in which an occupant may have particular reason for coming forward is if her co-occupant is concealing contraband within the shared premises. See, *e.g.*, *People* v. *Cosme*, 397 N.E.2d 1319 (N.Y. 1979); *State* v. *Frame*, 609 P.2d 830 (Or. Ct. App. 1980). Because of the possibility that she would be perceived guilty by association or that her co-occupant would attempt to shift the blame, the risk of being arrested or "being convicted of possession of drugs one knows are present and has tried to get the other occupant to move is by no means insignificant." 4 LaFave, *supra*, § 8.3(d), at 162 n.72; see *Schneckloth*, 412 U.S. at 243 (noting "interest in encouraging consent" because evidence "may insure that a wholly innocent person is not wrongly charged"). Cf. *Maryland* v. *Pringle*, 540 U.S. 366 (2003) (discovery of drugs in car can give rise to probable cause for the arrest of all occupants).

As one court has explained in upholding a search based on a third party's consent in such circumstances, "[i]t would be a harsh doctrine, indeed, that would prevent an innocent pawn from removing the taint of suspicion which had been cast upon him by a defendant's [actions]." *United States* v. *Botsch*, 364 F.2d 542, 547 (2d Cir. 1966), cert. denied, 386 U.S. 937 (1967); 4 LaFave, *supra*, § 8.3(d), at 161-162.[7] And putting aside the possi-

[7] See also *United States* v. *Diggs*, 544 F.2d 116, 120-121 (3d Cir. 1976) ("[T]he right of the custodian of the defendant's property who has been unwittingly involved by the defendant in his crime to exculpate himself promptly and voluntarily by disclosing the property and

bility of exigent circumstances justifying a warrantless entry, giving effect to an occupant's consent may be necessary to avert destruction of contraband by the nonconsenting occupant. Cf. *Illinois* v. *McArthur*, 531 U.S. 326 (2001) (finding reasonable a temporary restraint on occupant's entry into his premises where officers had probable cause and were in the process of securing a warrant for destructible contraband).

Another situation that involves heightened interest in validating an occupant's consent arises when her consent is given in connection with allegations of abuse at the hands of her co-occupant. Several of the reported decisions considering the ability of a third party to give effective consent against a co-occupant involve that situation. See *Rodriguez*, 497 U.S. at 179; *United States* v. *Donlin*, 982 F.2d 31 (1st Cir. 1992); *United States* v. *Hendrix*, 595 F.2d 883 (D.C. Cir. 1979); *People* v. *Sanders*, 904 P.2d 1311 (Colo. 1995). A co-occupant whose own actions are alleged to have placed the consenting occupant at risk should not be permitted to negate the other person's consent to an entry and search. See 4 LaFave, *supra*, § 8.3(d), at 161 ("There is much to be said for the proposition that where the defendant has victimized the third party," the "emergency nature of the situation is such that the third-party consent should validate a warrantless search despite defendant's objections.") (citation and internal quotation marks omitted).

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explaining his connection with it to government agents, must prevail over any claim of the defendant to have the privacy of his property maintained against a warrantless search by such agents."); *United States* v. *Cataldo*, 433 F.2d 38, 40 n.2 (2d Cir.) (upholding roommate's consent to search bedroom shared with defendant in part because consenting party "had a valid right to prove to the agents that he was not harboring a fugitive"), cert. denied, 401 U.S. 977 (1970).

Finally, the approach of the Georgia Supreme Court could detract from the efficient conduct of law enforcement investigations. Because an occupant's ability to give effective consent would be conditioned on her co-occupant's absence from the premises, the rule adopted below would give officers an incentive to adjust the timing of a request for consent. For instance, if officers have probable cause for an arrest, they could arrest the subject and remove him from the scene before seeking consent to search from a co-occupant. Cf. *Matlock*, 415 U.S. at 166. If officers lack probable cause for an arrest, they could wait for an objecting occupant to leave before seeking consent from a cooperating co-occupant.[8] A rule that could encourage those sorts of measures would impair efficient investigations without serving any valid countervailing purpose. That result would be at odds with the concern expressed in *Schneckloth* to avoid imposing undue restrictions on consent searches. See 412 U.S. at 228, 243.

C. The Ability Of An Occupant To Consent To A Search Should Not Turn On Whether Her Co-Occupant Makes An Explicit Objection

The Georgia Supreme Court held that officers must obtain the consent of each co-occupant who is on the premises. Pet. App. 3. But the court also pointedly referred to the fact that petitioner explicitly objected to the search. *Id.* at 2. An approach that attaches signifi-

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[8] Insofar as officers are encouraged to wait for the suspect to leave the premises before obtaining consent to a search, the outcome would be contrary to their interest in keeping the suspect at the scene to facilitate an arrest if the search uncovers incriminating evidence. Cf. *Michigan* v. *Summers*, 452 U.S. 692, 702-703 (1981) (upholding detention of owner of premises during execution of search warrant).

cance to whether an affirmative objection was made is unsound and inconsistent with general Fourth Amendment principles.

The fact that an occupant expresses an objection to a search would matter if, in the absence of such an objection, it is assumed that all occupants agree to be bound by a consenting party's action. But *Matlock* plainly does not rest on any such assumption. Instead, the Court explained that the consenting occupant has an independent right to permit a search of her own accord, and that her co-occupants have assumed the risk that she might do so against their wishes, whether express or implied. See 415 U.S. at 171 n.7. Indeed, any assumption that the co-occupants are in agreement would be particularly unwarranted in view of the fact that third-party consent issues often arise when the consent is aimed to facilitate an investigation against a co-occupant. In *Rodriguez*, for instance, the officers entered the defendant's apartment after his presumed co-occupant had told officers that she had been assaulted by the defendant earlier that day. There would be no basis in that context for assuming that the defendant agreed with her decision to consent to an entry. Rather, it would seem much more likely to assume that the sleeping Rodriguez would have objected if roused. Likewise, it seems realistic to assume that the arrested defendant in *Matlock* would have objected if he had been asked for consent while sitting in the patrol car. In light of the facts in the Court's prior cases, it would be odd for the constitutional rule to turn on the extent to which an objection was made explicit.

Because a co-occupant has the right to consent to a search of the jointly-occupied premises and the joint occupants have assumed the risk that a co-occupant

might permit a search of the premises against their interests or wishes, the fact that the occupant makes explicit his objection to a search does not change the analysis. As one court has explained, "[w]e cannot see how the additional fact of [the defendant's] * * * refusal to consent in any way lessened the risk assumed that his co-occupant would consent. This additional fact does not increase a reasonable expectation of privacy." *United States* v. *Sumlin*, 567 F.2d 684, 688 (6th Cir. 1977); accord *Morning*, 64 F.3d at 536; *Hendrix*, 595 F.2d at 885.

More broadly, the Georgia Supreme Court's emphasis on an explicit consent is inconsistent with general Fourth Amendment principles. The normal rule is that a home-owner need not object explicitly to preserve his Fourth Amendment rights. Rather, the burden is on law enforcement to obtain his valid consent. See pp. 19-20, *supra*. But where, as here, a consent to search the premises has been given by someone entitled to grant it, the objection of a co-occupant makes no difference, whether the objection is explicitly stated or merely presumed. Indeed, in light of the general principle that the burden is on law enforcement to obtain consent rather than on the property owner to object, the decision below is in tension with settled law including *Matlock*. If a joint occupant's explicit objection were material, it might suggest that officers who know of another occupant's presence on-site would be required to obtain his consent before proceeding with a warrantless search. Such a rule might logically also be extended to require that officers attempt to track down an off-site joint-occupant to ascertain his views. An "objecting-occupant-prevails" rule might also cast doubt on the result in cases in which an occupant who is known to be present on the premises lacks a meaningful opportunity to make an explicit ob-

jection.[9] Those complications confirm the analytical defects in an approach that would accord dispositive significance to an explicit objection.

Whether an occupant affirmatively objects to a search thus should not bear on the analysis. Rather, the salient question is whether officers are required to obtain the occupant's consent even though they already have the consent of a third party who possesses common authority over the premises. As to that question, Fourth Amendment principles lead to the conclusion that officers can conduct a search upon securing the consent of an occupant who shares the premises with another, regardless of the other occupant's presence at the scene or his explicit objection to a search.

D. The Search Of Respondent's Residence Was Reasonable Because Officers Had Obtained His Wife's Consent

After explaining in *Matlock* that officers may effect a search based upon the consent of a third party who "possesse[s] common authority over or other sufficient relationship to the premises," 415 U.S. at 171, the Court clarified that the requisite "common authority" exists when the occupants "generally hav[e] joint access or control for most purposes," *id.* at 171 n.7. The trial court in this case found that, although respondent's wife had only recently returned to the marital residence after having left for a period of time, she "was still in possession of common authority to grant consent for police to search the marital home." J.A. 23. The Georgia Supreme Court likewise concluded that it was "faced with

[9] In *Matlock*, for example, the officers placed the defendant in a parked squad car upon his arrest and then went to his home to seek the consent of his co-occupant. In *Rodriguez*, the defendant was known to be asleep within the apartment at the time of the officers' entry.

a situation in which two persons have equal use and control of the premises to be searched." Pet. App. 1.

Accordingly, this case does not involve circumstances in which two occupants have differing degrees of authority over the residence. See 4 LaFave, *supra*, § 8.5. Nor has there been any suggestion that the bedroom in which the evidence was found was a particular area of the house over which respondent had greater authority. Rather, the Georgia Supreme Court determined that the search was invalid under the Fourth Amendment solely on the basis that respondent's presence on the premises divested his wife of authority to give an effective consent to search. That holding was incorrect.[10]

[10] Respondent suggested in his Brief in Opposition (at 4) that the Georgia Supreme Court based its decision on the Georgia Constitution. That is incorrect. The court based its holding on an interpretation of this Court's decision in *Matlock*, which turned exclusively on the Fourth Amendment. See Pet. App. 2-3. The court made clear its reliance on the Fourth Amendment when it stated at the conclusion of its opinion that a resolution contrary to the one it reached would "exalt[] expediency over an individual's Fourth Amendment guaranties." *Id.* at 3 (quoting *Leach*, 782 P.2d at 1040). In any event, the court's opinion contains no plain statement that it rests on state law. See *Rodriguez*, 497 U.S. at 182 (discussing *Michigan* v. *Long*, 463 U.S. 1032 (1983)).

CONCLUSION

The judgment of the Supreme Court of Georgia should be reversed.

Respectfully submitted.

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